Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-2052

DANNY SMITH,
Petitioner,

vs.

THE STATE OF GEORGIA,
Respondent.

PETITION FOR THE WRIT OF CERTIORARI TO THE HONORABLE COURT OF APPEALS OF THE STATE OF GEORGIA

PYE, GROOVER & DAILEY
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PETITION FOR THE WRIT OF CERTIORARI TO THE HONORABLE COURT OF APPEALS OF THE STATE OF GEORGIA

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RECORD AND TRANSCRIPT

References to the Record (R.) and Transcript (T.) are to those documents in the office of the Clerk of the Honorable Court of Appeals of Georgia

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TO: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES,

AND

THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AND

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petitioner, *DANNY SMITH,* respectfully prays that the Writ of Certiorari issue to the Honorable Court of Appeals of the State of Georgia to review the judgment and opinion of said court adverse to Petitioner entered in criminal proceedings against him on March 20, 1980, as stated in its Opinion and Judgment set forth in the Appendix hereto:

OPINIONS BELOW

The opinion of the Honorable Court of Appeals of the State of Georgia is not yet reported, and is set forth in the appendix hereto, as is the dissenting opinion.

The record of Petitioner's trial before the Court and Jury in the Honorable Superior Court of Liberty County, Georgia, (Hinesville, Georgia), wherein he was convicted of possession of marijuana with intent to distribute (R.4, 184), his Motion for New Trail being denied June 15, 1979 (R. 185-187; 194-197,) is in said Superior Court, and also in the record in said Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals of the State of Georgia affirming the judgment of said Superior Court denying Petitioner's Motion for New Trial was dated and entered March 20, 1980, (the date also of its Opinion), Appendix p. 1. Motion for Rehearing was denied March 31, 1980, Appendix p. 8. The Honorable Supreme Court of Georgia denied a Petition for the Writ of Certiorari April 29, 1980; (Appendix, p. 9; and this Petition for Certiorari is filed within 60 days from that date and within 90 days from the date of the denial of said Motion for Rehearing by the Court of Appeals of the State of Georgia. The Jurisdiction of the Supreme Court is invoked pursuant to 28 *U.S.C. SEC. 1257(3).*

QUESTIONS PRESENTED FOR REVIEW AND THE CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

ONE

Marijuana, alleged in the indictment to have been in Petitioner's possession, and also a pocket-book or billfold, and a coffee cup and legal pad on which were Petitioner's fingerprints, the latter contended to be evidence corroborating the testimony of Don Michael Drake, his accomplice, were seized by officers of the State, on the shrimp-boat "Miss Carol J", as the result of search pursuant to a warrant *issued without probable cause:*

In denial of Petitioner's Motion to Suppress, and the reception of such contraband, and said pocket-book, coffee cup and pad, in evidence against Petitioner on his jury trial, violative of the Constitution of the United States, 4th Amendment, providing:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures,

shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TWO

Under the law of Georgia, one may not be convicted upon the testimony of an accomplice without other evidence, which itself directly connects such one with the crime charged, *Ga. Code Sec. 38-121; Price v. State 208 Ga. 695, 696 (3a).*

In this case, however, Petitioner was convicted *without such corrborating evidence* (as is shown in the dissenting opinion).

Is such conviction *without proof* a denial of Federal *due process of law*?

Thompson v. Louisville, 362 U.S. 199, 4 L. ed(2) 654; 80 A.L.R. (2) 1355.

Is such *denial* of *equal justice* a violation of *Federal due process? Yick Wo v. Hopkins, 118 U.S. 356.*

In each of said respects is there a violation of Sec. 1 of the 14th Federal Amendment, providing;

Nor "shall any State deprive any person of life (or) liberty. . .without due process of law"?

CONCISE STATEMENT OF CASE WITH MATERIAL FACTS

A warrant was issued by Justice of the Peace Keel, March 14, 1978 at 7:50 p.m., authorizing search of the shrimpboat "Miss Carol J". The warrant recited that it was pursuant to the affidavit of John Dasher and also that it was, "based upon the affidavit given under oath or affirmation and all other testimony given to me under oath". (States' Exhibit 1, Appendix p. 20). The Affidavit of John Dasher, deputy Sheriff, recited: ". . . this act was witnessed by a Don Michael Drake. See attached statement that is made a part of this affidavit". (States' Exhibit 1, Appendix pp. 29 - 30.

Drake's unsworn statement is set forth by the Court of Appeals in the case of *Cuevas v. State, 151 Ga. Apps at P. 607* (Appendix p. 10.) which is referred to the opinion of said Court at Bar. Drake was an accomplice, (opinion of Court of Appeals at Bar). Dasher's affidavit also referred to an unsworn statement made to him by Deputy Sheriff Groover. Dasher was without personal knowledge. The State relied for probable cause and the legality of the search under the warrant of "Miss Carol J" solely upon the references in the affidavit of Dasher to such statements of Drake and Sheriff Groover. (See relevant portions of the testimony of John Dasher upon the hearing of the Motion to Suppress set forth in Appendix, pp. 36 - 66.

In the search a large quantity of marijuana was found on "Miss Carol J", as was also a bill-fold containing Petitioner's name and photograph and a coffee cup and legal pad whereon were Petitioner's finger-prints. (T. 211-213, 216-218). Don Michael Drake, sworn by the State against Petitioner as an accomplice, testified that he and Petitioner both helped in "placing the marijuana on 'Miss Carol J'." (Opinion of Court of Appeals at Bar, p. 2). As stated by the Court of Appeals, under Georgia law Drake's testimony "must be corroborated by other evidence" (opinion p. 2). There was no corroborating evidence (unless the bill fold, coffee cup and legal pad be so regarded). The reference on p. 2 of the opinion of the Court of Appeals to "admissions" of Petitioner refers only to his testimony that as a commercial fisherman he had rented "Miss Carol J" twice, the last time in February 1978, before the

marijuana was discovered aboard her March 13, 1978. As shown in the *dissenting opinion,* the aforesaid evidence was *insufficient to corroborate Drake.*

Federal questions were raised as follows: (1) in respect of the search warrant, by Motion to Suppress, copy of which is at Appendix, pp. 31 - 32.

(2) As to conviction without evidence, by Motion for Directed Verdict in the Trial Court for insufficiency of evidence which *necessarily* as Petitioner contends, included the question of Federal due process; and also before the Court of Appeals See Division One of Opinion at Bar.

CONCISE ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

(1) To review the question whether the Fourth Amendment was violated by issuance of the warrant for the search of "Miss Carol J", *without probable cause*, when the sole affiant Dasher had no knowledge of the matters related, his information being based upon the unsworn statement of *accomplice* Drake, made to Agent Stone, and statements made to Deputy Groover.

Spinelli v. United States, and Justice White's concurring opinion, *393 U.S. 410, 423; Nathason v. United States 290 U.S. 41.*

(2) To review the question whether a conviction *without evidence*, (except the uncorroborated evidence of an *accomplice*), is violative of Federal Due Process.

Thompson v. Louisville, 362 U.S. 199, 4 L.ed(2) 654, 80 A.L.R. (2) 1355;

And whether such conviction, contrary to State Law, is a denial of *equal rights* and thus of Federal Due Process. *Yick Wo. v. Hopkins*, 118. U.S. 356.

The Court of Appeals of the State of Georgia, in *deciding* that the search of "Miss Carol J" under the aforesaid warrant was in conformity with the 4th Amendment, and that the trial court properly denied petitioner's motion to suppress the evidence which was the fruit of such search, (1) decided a federal question of substance not heretofore determined by the Supreme Court, *to-wit*: whether the *unsworn statements of an accomplice may establish probable cause*; and (2) decided the question of probable cause in a way probably not in accord with the decision of the Supreme Court in *Spinelli v. United States, 393 U.S. 410*. The Court of Appeals of the State of Georgia *also*, in deciding that there was evidence to convict petitioner, determined this question in a way probably not in

accord with the decision of the Supreme Court in *Thompson v. Louisville, 362 U.S., 179.*

WHEREFORE, Petitioner prays that the Writ of Certiorari issue to the Honorable Court of Appeals of the State of Georgia, and that such proceedings be had as are in conformity with the laws of the United States and the Constitution thereof.

Respectfully submitted,
PYE, GROOVER & DAILEY

LEWIS M. GROOVER, JR.

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STATE OF GEORGIA
COUNTY OF DEKALB

AFFIDAVIT OF SERVICE

Personally appeared LEWIS M. GROOVER, JR., who, on oath deposes and says that he, as counsel for petitioner in said case, has served all parties required to be served.

Further, that he on the____day of June, 1980, deposited in a United States mail box three copies of the foregoing Petition for Certiorari, with first class postage prepaid, addressed to each of counsel of record for the State of Georgia, at the post office address of counsel, to-wit:

Honorable Arthur K. Bolton,
Attorney General,
Judicial Building,
Room 132,
Atlanta, Georgia 30334

and to

Honorable Dupont K. Cheney,
District Attorney,
P. O. Box 653,
Hinesville, Georgia 31313.

_____

LEWIS M. GROOVER, JR.

Sworn to and subscribed before
me this ___day of _____
_____ , 1980.

_____

Notary Public

My Commision expires: _____

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1. Certified copy of Opinion of the Court of Appeals of the State of Georgia *at Bar.* 1

2. Certified copy of Order Denying Motion for Rehearing. 8

3. Certified copy of Order of the Supreme Court of Georgia Denying Application for the Writ of Certiorari. 9

4. Copy of the Opinion of the Court of Appeals of Georgia in *Cuevas v. State, 151 Ga. Apps. 605,* referred to in opinion at Bar. 10

5. *State's Exhibit 1,* the Search Warrant and supporting affidavit of John Dasher. 20

6. Motion to Suppress and Order thereon. 31

7. Relevant proceedings upon the Motion to Suppress and relevant portions of the testimony of John Dasher. 36

NOVEMBER
AFFIRMED

So-232
(transferred to McM)

59023. SMITH v. THE STATE

McMURRAY, Presiding Judge.

Defendant Smith was indicted, tried, and convicted of possession of marijuana with intent to distribute, a felony, in violation of the Georgia Controlled Substances Act. He was sentenced to serve a term of 10 years. A motion for new trial was filed, amended, and denied. Defendant appeals. *Held*:

1. The issue in the first enumeration of error is that the trial court erred in denying defendant's motion for directed verdict of acquittal inasmuch as a felony had been charged and there was insufficient evidence to convict as a matter of law. Defendant contends that the evidence was based upon the testimony of an accomplice, uncorroborated by facts and circumstances which in themselves directly connected the defendant with the crime.

The case of *Cuevas v. State*, 151 Ga. App. 605 (260 SE2d 737), as to the possession of marijuana with intent to distribute involves five other persons charged with this same crime. See also in this connection *Arnsdorff v. State*, Ga. App. (SE2d) [No. 58294, decided October 17, 1979]. Marijuana was seized on the shrimp boat "Miss Carol J," and the accomplice who was involved in the unloading of marijuana into trucks testified that this defendant left "Morgan's Dock" on the "Miss Carol J" and returned a few days later on March 13, 1978, at which time it contained a large amount of marijuana. The accomplice testified that he and the defendant both helped unload the marijuana. However his testimony must be corroborated by other evidence.

Other witnesses testified that the boat was searched by law enforcement officers. A billfold was found on board containing the name Daniel Phillip Smith, as well as defendant's picture. A coffee cup and a legal pad were also found in the wheelhouse of the boat. Defendant's fingerprints were found on these two items (coffee cup and legal pad). In the defendant's testimony he admitted he was a commercial fisherman and had rented the "Miss Carol J" twice, the last time about the middle of February, 1978. He also testified he had apparently left his billfold on the boat in February, 1978, and discovered that he had lost it after his return to his home in Florida. This evidence, of course, could explain the location of his fingerprints and billfold on board without involving criminal activity on his part. However, the jury did not believe this. Yet this evidence was sufficient to corroborate the testimony of the accomplice. Corroborating evidence must be as to the identity and participation of the accused tending to connect him to the crime or lead to the inference that he is guilty. See *Smith v. State*, 238 Ga. 640, 641 (235 SE2d 17) and cases cited. The defendant admitted he had been in the presence of the shrimp boat, "Miss Carol J," but he contends it was in February, 1978, not on or about March 13, 1978, when the marijuana was discovered aboard the "Miss Carol J." His fingerprints on the legal pad and coffee cup, as well as his wallet and picture and admissions in evidence are sufficient corroborating testimony of the accomplice's testimony to authorize the jury's verdict of guilty. There is no merit in this complaint.

2. Defendant also contends he was denied a right to a thorough and sifting cross examination of the accomplice. The scope of the cross examination rests largely with the trial judge, and his discretion will not be controlled by a reviewing court unless it is abused. The trial court may properly restrict the cross examination to matters material or relevant to the issues. *Jones v. State*, 135 Ga. App. 893, 897-898 (5) (219 SE2d 585); *Allen v. State*, 137 Ga. App. 302, 303(3) (223 SE2d 495); *Birge v. State*, 143 Ga. App. 632, 634-635 (4) (239 SE2d 395). Here, however, a thorough and sifting examination of the witness was allowed except in one instance in which an objec-

tion was raised and sustained as to whether or not the person who had employed the witness to work for the city kenw certain law enforcement officers. Whether or not this third person knew law enforcement officers is irrelevant to the case. There is no merit in this complaint.

3. Another enumeration of error alleges error when the court refused to permit impeachment of the state's sole eye witness, the accomplice, by use of the witness' juvenile record adjudging him a delinquent for commission of a crime involving moral turpitude. The record here as to this witness, the accomplice, shows only that he had been adjudicated a delinquent in a juvenile court proceeding. In a proceeding under the porvisions of Code Title 24A adjudication of delinquency is not a conviction of a crime. Code Ann. § 24A-2401(a) (Ga. L. 1971, pp. 709, 736); *K.M.S. v. State of Georgia*, 129 Ga. App. 683, 684 (200 SE2d 916). To impeach a witness it is necessary to introduce an authenticated copy of the record of the court in which he was convicted. An adjudication of delinquency in a proceeding under the provisions of Code Title 24A is not a criminal conviction. There is no merit in this complaint.

4. The next enumeration of error is as to the failure to show a proper chain of custody as to the contraband admitted into evidence over objection. The circumstances need only establish the reasonable assurance of the identity of the same. See *Patterson v. State*, 224 Ga. 197, 199 (2) (160 SE2d 815); *Meadows v. State*, 135 Ga. App. 758, 759, 760 (219 SE2d 174); *Davis v. State*, 135 Ga. App. 203, 204 (1) (217 SE2d 343); *Johnson v. State*, 143 Ga. App. 169 (1) (237 SE2d 681). Absent any evidence to the contrary, the evidence presented by the State was sufficient to establish the chain of custody. *Davis v. State*, 135 Ga. App. 203, supra; *Johnson v. State*, 143 Ga. App. 169, supra.

5. In denying the defendant's motion to suppress evidence allegedly obtained as a result of illegal searches and seizures, we here refer to *Cuevas v. State*, 151 Ga. App. 605, 607 (1), supra, in which this court extensively reviewed a similar motion to suppress the evidence seized and the ruling there is control-

ling here. There is no merit in this complaint. See also *Arnsdorff v. State*, Ga. App. (4), supra; United States v. Harris, 403 U.S. 573, 581 (91 SC 2075, 29 LE2d 723); *Davis v. State*, 129 Ga. App. 158, 159-160 (3) (198 SE2d 913); *Smith v. State*, 136 Ga. App. 17 (220 SE2d 11).

Hearsay information which relates to the criminal activity in such detail as to assure the magistrate that the information provided is more than a casual rumor circulating in the underworld may also establish the needed credibility and reliability. *Sams v. State*, 121 Ga. App. 46, 48 (1) (172 SE2d 473); *Smith v. State*, 136 Ga. App. 17, supra. There is no merit in this complaint.

6. The trial court did not err in its instruction to the jury on constructive possession. The defendant here was not caught in actual possession of the marijuana, but the testimony was such that the jury would have been authorized to find that although not in actual possession he knowingly had both the power and the intention to exercise dominion or control over it See *Neal v. State*, 130 Ga. App. 708, 710-711 (2) (204 SE2d 451) and *Bradley v. State*, 137 Ga. App. 670 (1) (224 SE2d 778).

7. The evidence was sufficient to support the verdict. After careful review of the trial transcript and record, we find and so hold that a rational trier of fact (the jury in the case sub judice) could readily have found the defendant guilty beyond a reasonable doubt of the offense of possession of marijuana with intent to distribute in violation of the Georgia Controlled Substances Act. See *Payne v. State*, 151 Ga. App. 165, 166 (259 SE2d 168); *Whatley v. State*, 151 Ga. App. 174, 175 (259 SE2d 175).

Judgment affirmed. Deen, C. J., Quillian, P. J., Shulman, Banke, Birdsong, Carley, JJ., concur. Smith and Sognier, JJ., dissent.

29023. SMITH v. THE STATE

SOGNIER, Judge, Dissenting

I respectfully dissent from Division 1 of the majority opinion. The rule relating to corroboration of accomplice testimony is that there must be evidence, *independent of the accomplice testimony*, which establishes, or infers, *direct participation* in the offense charged, and is more than sufficient to merely cast on the defendant a grave suspicion of guilt. *Allen v. State*, 215 Ga. 455, 457 (111 SE2d 70) (1959). Accord: *Gunter v. State*, 243 Ga. 651, 654-655 (256 SE2d 341) (1979); *Vaughn v. State*, 139 Ga. App. 565 (228 SE2d 541) (1976). Eliminating the testimony of the accomplice in this case, all that remains is the fingerprint evidence and evidence that a billfold containing Smith's name and picture was found on the "Miss Carol J". The most this evidence establishes, even by inference, is that at some unknown time (accepting the testimony of the State's expert witness) Smith was on the "Miss Carol J". It does not establish, even by inference and *independent* of the accomplice testimony, that Smith participated in the offense charged on March 13, 1979.

I recognize that the corroborating evidence need not be sufficient, in and of itself, to establish an accused's guilt; however, it must be sufficient, at a minimum, to establish the defendant's participation in the offense charged without consideration of the accomplice's testimony. If the evidence independent of the accomplice testimony is not sufficient to establish that Smith was on the boat on March 13, 1979, it is certainly not sufficient corroboration; at most, it creates a grave suspicion of guilt. This is in accord with Division 4 of this Court's opinion in *Barnett v. State* (Case No. 59238, decided February 12, 1980).

Lastly, the case of *Cuevas v. State*, 151 Ga. App. 605 (258 SE2d 285) (1979) relied on by the majority, is totally different factually from the instant case. *Cuevas* was apprehended in the back of the van used to transport the marijuana, thus connecting him directly with the offense charged. In the instant case

Smith was not at the boat, the warehouse or the van; in fact, he was not present at all. Thus, the only evidence connecting the defendant with the offense charged was the uncorroborated testimony of the accomplice.

I agree with this Court's disposition of the remaining enumerations of error; however, in my opinion, Enumeration 1 requires reversal.

COURT OF APPEALS OF THE STATE OF GEORGIA

Clerk's Office,
Atlanta, June 12, 1980

I hereby certify that the foregoing pages attached hereto contain a true and complete copy of the opinion of the Court of Appeals of Georgia in the case therein stated, as appears from the original of file in this office.

Witness my signature and the seal of said Court hereto affixed the day and year above written.

SEAL

Morgan Thomas

Clerk.

Court of Appeals
of the State of Georgia

ATLANTA, March 31, 1980

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

59023 Danny Smith v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta March 31, 1980

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Morgan Thomas
CLERK.

SUPREME COURT OF GEORGIA

ATLANTA, April 29, 1980

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

Danny Smith v. The State

Upon consideration of the application for certiorai filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA May 15, 1980

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

SEAL Hazel E. Hallford, Deputy

CLERK.

Case No.

Court of Appeals of Georgia

Remittitur from Supreme Court

Filed in office

Clerk Court of Appeals of Georgia.

QUILLIAN, Presiding Judge.

The defendant and his four companions appeal their conviction of one count of possession of marijuana with intent to distribute. Deputy Sheriff Dasher, of Liberty County, was patrolling on the evening of March 13, 1978, at approximately 10:30 p.m. when he observed someone walking in the area of a warehouse in which all of the lights were off. He "didn't know whether they were breaking in or what, so [they] stopped to check it out." It was the owner, Sue Youngblood, who advised them "everything was alright." They were aware of her previous "record." The deputy stated: "We realized something wasn't right . . ." They set up surveillance across the road. A red and silver Thunderbird automobile entered the warehouse area and Sue Youngblood talked to them. She said something about "money" to the driver. The car left and a red and white truck came in and left. Later, a large "white van type truck" backed up to the warehouse door and began unloading its cargo. The deputy sheriff was familiar with marijuana bales from earlier investigations and these "appeared to be bales of marijuana being off-loaded and put into the Coastal Sign warehouse."

When the white van left he radioed Deputy Sheriff Groover and advised him "to stop the truck . . . see if they would give us permission to search the truck, if not we would get a search warrant." Deputy Groover saw the truck approach and he fell in behind for a short distance and then pulled them over. Deputy Dasher had already radioed him that "they were unloading marijuana" at the Coastal Sign warehouse. Defendant Cave was driving and one of the other defendants was a passenger. He asked Cave for his driver's license. It was a Florida license and Cave "talked like he was a foreigner." It was noted that the truck had dual wheels.

Deputy Groover asked defendant Cave if he would mind opening up the doors to the back of the truck. Defendant Cave

hesitated and Groover stated: ". . . I told him if he didn't want to open the truck that I would get a search warrant to open it." Cave produced the keys and unlocked the rear door. The remaining three defendants were inside. All five defendants were placed in the rear of the patrol car and deputy Groover saw "marijuana seeds" and "strings from burlap bags" in the back of the truck. He entered the truck and found three loaded pistols.

With the combined knowledge that the white van truck with dual wheels, had been intercepted headed east on I-95, toward the coast, and that the driver spoke with a foreign accent and had a Florida driver's license, all deputy sheriffs began looking for dual wheel tracks leading from the highway to the coastal area. Deputy Stagmeier, after checking several coastal locations, found dual wheel tracks leading toward "Sunbury" and called the GBI agent in charge of the investigation. When the GBI agent arrived they followed the dual wheel tracks to "Morgan's Dock" where they observed approximately eight boats. It was then between 5 and 5:30 a.m. in the morning. The police located a Don Drake on the boat "High Noon." They Talked to him about what he had seen and then took a statement from him that he had talked to two people who said they"planned. . .bring in some stuff." One of them called Miami and then they took on about 1000 gallons of fuel, but did not take any ice, aboard the shrimp boat Miss Carol J and departed. After the Carol J returned one man stated "that we are going to deal tonight between 7:30 and 8:00 p.m." That evening one of them drove up in his grey and burgandy Thunderbird and then a red and white truck arrived and finally a creme colored Ford van truck arrived. Four armed "spanish or mexican" males got out of the last truck and they began to unload "bales wrapped in 'krocker' sacks from the hold in the Carol J. and load them on" the trucks. Drake stated that he went on the Carol J "and saw several bales still in the hold." A justice of the peace came to the dock area, swore the afiants, then issued the search warrants for the Carol J and Coastal Sign warehouse. He did not participate in the subequent search. A search of the Carol J revealed 162 bales of marijuana, approximately two tons, in two of the three holds of the ship. A search

of the Coastal Sign warehouse turned up 403 bales of marijuana. The defendants appeal their conviction. *Held:*

1. The defendants enumerate but one error—that the trial court erred in denying their motion to suppress the evidence which they contend "was obtained as the direct result of a series of illegal searches and seizures conducted without probable cause." However, they subdivide this enumeration into five separate claims.

A. It is urged that there was a lack of probable cause to search the defendants truck. This enumeration does not face the principle issue: "Was the search of the truck legal?" We find that it was, as there was a valid consent and probable cause existed to make the search.

Warrantless searches of motor vehicles have always been based on different criteria than those of an individual's home. The principal basis has been the mobility of the auto makes it impractical to immediately secure a warrant. Carroll v. United States, 267 U.S. 132, 153-154 (45 SC 280, 69 L. Ed. 543) Less stringent requirements govern search of motor vehicles because the expectation of privacy in one's auto is significantly less than in one's home. South Dakota v. Opperman, 428 U.S. 364, 367 (96 SC 3092, 49 LE2d 1000). However, there are other exceptions to the warrant requirement: 1. consent, 2. incident to lawful arrest, and 3. probable cause with exigent circumstances. United States v. Jeffers, 342 U.S. 48 (72 SC 93, 96 LE 59).

In the instant case the police officials observed from neutral ground (across the road) the developments that aroused their suspicion. A trained police officer, with previous experience in investigations involving bales of marijuana, saw what he thought to be bales of marijuana being unloaded from a white van type truck. This is a sufficient basis for probable cause to stop and search the truck for evidence of residue of marijuana, for as the term implies in dealing with probable cause the police officer deals with probabilities. *Sanders v. State*, 235 Ga. 425, 440 (219 SE2d 768); *Kiraze v. State*, 147 Ga. App. 832, 833 (SE2d).

It is not determinative that the officer himself thought that he did not have probable cause to search. Probable cause is not to be determined by law enforcement officials but a neutral, detached magistrate. Coolidge v. New Hampshire, 403 U.S. 443 (91 SC 2022, 29 LE2d 564). The defendant may be anxious to accord undue weight to this officer's opinion that he did not have probable cause, but if a police officer's opinion was controlling, it is doubtful that any searches in the future would ever be found unreasonable as law enforcement officials almost always appear to believe they have probable cause to search.

The criterion is whether, at that moment, the facts and circumstances within his knowledge and of which he had reasonable trustworthy information, including information from other police officers (Whiteley v. Warden, 401 U.S. 560, 568 (91 SC 1031, 28 LE2d 306), were sufficient to warrant a prudent person in believing the defendants had or were committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (85 SC 223, 13 LE2d 142). We find that there was probable cause.

Secondly, a valid consent search was established. No one could seriously contest the conclusion that suspicious activities were taking place at a late hour in a formerly closed warehouse involving a person with a known cirminal background. A Terry-type stop was authorized because of the founded and articulable suspicion that the defendants possessed contraband. Adams v. Williams, 407 U.S. 143, 146 (92 SC 1921, 32 LE2d 612). The officer testified: "I asked him if he minded opening the truck up or the back of the truck, that I wanted to see in the back of the truck. Q. Okay, what did he say? A. He hesitated and then I told him if he didn't want to open the truck that I would get a search warrant to open it . . . He reached in his pocket pulled out a key and unlocked the door . . ."

Consent searches are valid (Davis v. United States, 328 U.S. 582, 583 (66 SC 1256, 90 LE 1453) but where the state relies upon consent, the burden is upon them to demonstrate that the consent was voluntary, and not the result of duress or coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218 (93 SC 2041, 36 LE2d 854). Voluntariness must be determined from all of the circumstances. *Brand v. State*, 129 Ga. App.

747, 748 (201 SE2d 180). The record discloses the officer did not draw his pistol, or use threatening or coercive language. He made a statement of fact, in essence: " Consent, or I will get a search warrant." Probable cause existed for the issuance of such a warrant and we see no obstacle to the procurement of a valid search warrant if one had been required. Where the statement is made that the subject can consent or a search warrant will be procured, if true, this does not amount to duress or coercion as would invalidate the subsequent search. *Bailey v. State*, 147 Ga. App. 621, 622 (249 SE2d 675); *Code v. State*, 234 Ga. 90 (III) (214 SE2d 873); see also *Guest v. State*, 230 Ga. 569, 571 (198 SE2d 158). "[T]he trial judge was authorized to find that the consent was not the product of coercion, duress or deceit." *Code v. State*, 234 Ga. 90, 95, supra.

B. It is alleged that "[t]he search of Morgan's Dock was accomplished by an illegal trespass upon private property and as such any evidence found was tainted and subject to suppression." Defendant's enumeration is fatally flawed in three aspects. First, there was no search of Mogans's Dock. Second, there was no trespass. Third, even if there were a trespass, defendants would have no right to avail themselves of such act as a ground for supperssion of contraband found on their boat.

There was no search of Morgan's Dock. The officers merely followed dual wheel tracks from a public road onto Mr. Morgan's property (a road) and thence to his business establishment—the dock area. No search was made of the dock itself. The officers were looking for a boat capable of transporting a large amount of marijuana into the United States. Mr. Morgan was present during the latter part of the investigation and made no objection. The officers were in the execution of their office in the investigation of a crime that had been committed in their presence at the Coastal Sign warehouse. See 87 CJS 1006, Trespass §§ 54, 55. *They were always on business property generally used by and open to the public*—where a person lawfully on the premises is generally considered to be an invitee. See Code Ann. § 105-401 (Code § 105-401). There was no trespass in the sense that there was an unlawful intrusion upon private property, or injury to another's property. United States v. Hanahan, 442 F2d 649 (7th Cir. 1971); United States v.

Conner, 478 F2d 1320 (7th Cir. 1973); see generally 27 EGL 428, Trespass SS 2, 3.

Last and most important, "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by search of a third person's premises or property has not had any of his Fouth Amendment rights infringed." Rakas v. Illinois, U.S. (99 SC 58 LE2d 387, 395). The dock area belonged to Mr. J. W. Morgan—not the defendants. Allegations of illegal searches, in violation of the Fourth Amendment, are personal rights which may not be asserted vicariously. Alderman v. United States, 394 U.S. 165, 174 (89 SC 961, 22 LE2d 176). In Rakas, the Supreme Court held that the test of standing to object to searches by one "legitimately on [the] premises"-as stated in Jones v. United States, 362 U.S. 257 (80 SC 725, 4LE2d 697) will no longer be followed. They affirmed the rule of Katz v. United States, 389 U.S. 347 (88 SC 507, 19 LE2d 576) that "capacity to claim the protection of the Fouth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." 58 LE2d 401, supra. The defendant's asserted "neither a property nor a possessory interest in the [dock] . . . [S]ince they made no showing that they had any legitimate expectation of privacy" in the dock area—a public business generally open to the public, they have not suffered a violation of any Fourth Amendment right. 58 LE2d 404, supra.

C. The warrant to search the Miss Carol J was not invalid for a lack of showing of probable cause that the vessel contained contraband. The police officer had observed what he thought to be bales of marijuana being unloaded from a dual wheeled truck. The search of the truck confirmed that seeds and burlap strings were present in the truck. The truck and its personnel had been stopped during a trip which could have been one of a series of trips. The only dual wheeled tracks leading to the ocean area led to Morgan's Dock. A witness, Don Drake, stated in an affidavit that he had seen the white van truck come to the dock and "four Spanish or Mexican males got out. All of them were wearing pistols . . . [He] heard [one person] tell

[another person] that he would meet them at the warehouse. [He] watched as they began to unload bales wrapped in 'krocker' sacks from the hold in the Carol J." After they loaded the first truck another truck was "loaded to the gills . . . " and the driver said "lets go to the warehouse . . ." "[He] went on the Carol J and saw several bales still in the hold."

The test for probable cause is "whether at that moment the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing that the [defendants] had committed or [were] committing an offense." *Sanders v. State*, 235 Ga. 425, 439, supra. We find probable cause to search the Carol J was present.

D. It is alleged that the warrant authorizing the search of the warehouse was void "because it failed to disignate the county in which the warehouse was located and where the warrant was to be executed." Defendants argue that a search warrant "must describe the location of the property to be searched with such exactitude as to allow a prudent officer to locate the place definitely and with reasonable certainty." Therefore, they contend the "fact that the county in which the warehouse to be searched was left blank in the warrant is a fatal defect and renders it void."

The affidavit for the search warrant states: "I am an Officer of the State of Georgia . . . and that I have reason to believe that in *Liberty* County, Georgia on the following described premises: a concrete block warehouse located on Ga. Hwy. 38 appx. 3/10 of a mile east of the SCL Railroad Tracks and bearing a sign 'Coastal Sign Co.' and a metal building with overhead door located next to the warehouse and the curtilage of these buildings . . ." The warrant itself states: "Georgia, *Liberty* County *Justice of Peace* Court To: All Peace Officers of The State of Georgia Affidavit having been made before me by *John Dasher*, an officer charged with the duty of enforcing the Criminal Laws, that he has reason to believe that in _____ County, Georgia _____

on the following described premises: A concrete block warehouse located Ga. Hwy. 38 appx. 3/10 of a mile east of the SCL Railroad tracks and bearing a sign 'Coastal Sign Co." and a metal building with overhead door located next to the warehouse and the curtilage of these buildings. . . There is now located certain property, namely marijuana which is contraband . . ."

The United States Supreme Court and our appellate courts in Georgia are in agreement that the provisions of the Fourth Amendment of the United States Consitution and Article I, Section I, Paragraph X, of the 1976 Georgia Constitution (Code Ann. § 2-110), requiring "no warrant shall issue except upon probable cause. . . particularly describing the place, or places to be searched, and the persons or things to be seized" is met "'if the description sufficiently permits a prudent officer with a search warrant to be able to locate the person and place definitely and with reasonable certainty. *Steele v. State*, 118 Ga. App. 433, 434 (164 SE2d 255); Steele v. United States, 267 U.S. 498, 503 (45 SC 414, 69 LE757).' *Fomby v. State*, 120 Ga. App. 387 (170 SE2d 585)." *Reed v. State*, 126 Ga. App 323 (1) (190 SE2d 587).

In *Steele v. State*, 118 Ga. App. 433 supra, a copy of the warrant omitted the name of the County which was used to be directed to the executing officers, but "the affidavit" included the name of the county along with the other description. We found the "omission" did not affect the substantial rights of the accused. Id. at 434. In the instant case we find the description in the warrant was sufficiently definite for *any* executing officer to locate the place to be searched without difficulty. Also, in the factual context of this case, the executing officer had already been observing the building he was to search with the warrant and we find no possibility of substantive error–only possible technical error, which is at most harmless error. This enumeration is without merit.

E. Defendants contend the warrant's affidavit to search the warehouse "contained a material misstatement known by the affiant" and includes information from "prior illegal searches" or "an invalid warrant." We have determined that the prior

search of the white van truck was permissive and the warrant for the search of the warehouse was not invalid because of the claimed lack of designation of a county. The warrant for the Miss Carol J was based in part on the statement of Don Drake who was at Morgan' Dock when the police arrived. His statement included the assertion that after the others had loaded the bales aboard the trucks and left: "I went on the Carol J and saw several bales still in the hold." Officers removed 162 bales of marijuana from the holds of the Carol J. Defendants augue that "it is obious that Drake's statement that he went aboard the boat and saw 'several' bales is not true." Thus, he contends "the warrant issued *to search the warehouse* was subsequently tainted and thus invalid." (Emphasis supplied.)

We emphasize that no argument is made that the statement relating to "several" bales of marijuana remaining aboard the Carol J. tainted the search of the shrimp boat. The argument is advanced that the statement was so inaccurate as to be patently false which was discovered by the officers after they searched the Carol J, thus—the allegedly false statement tained the subsequent search of the Coastal Sign warehouse by stating in the application for that warrant that a search of the Carol J "has revealed appx. 2 tons of baled marijuana." We do not agree.

In Franks v. Delaware, U.S. (98 SC , 57 LE2d 667, 672), the Supreme Court held "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for truth, was included in the warrant affidavit, and *if the allegedly false statement is necessary to the finding of probable cause*, the Fourth Amendment required that a hearing be held at the defendant's request. In the event at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." (Emphasis suppliedl)

Pretermitting the issue of whether the statement by Don Drake was false or made with reckless disregard for the truth, with that evidence disregarded the remaining factual criteria adequately establish probable cause to search the Coastal Sign warehouse. Accordingly, under Franks v. Delaware, supra, the search warrant was not invalidated even if the Drake statement were excluded. This enumeration is without merit.

Judgment affirmed. Smith and Birdsong, JJ., concur.

STATE'S EXHIBIT 1 WAS IN HAND SCRIPT IN MATERIAL PARTS. WHAT FOLLOWS IS A TYPE SCRIPT RENDITION.

SEARCH WARRANT

DEPARTMENT _____

GEORGIA, LIBERTY COUNTY JUSTICE OF PEACE COURT

TO: ALL PEACE OFFICERS OF THE STATE OF GEORGIA

Affidavit having been made before me by *JOHN DASHER* an officer charged with the duty of enforcing the Criminal Laws, that he has reason to believe that in *LIBERTY* County, Georgia

on the person of:

AT the following described premises: MORGANS DOCK SUNBURY LIBERTY COUNTY, GEORGIA

AND in the following described boat: Miss Carol J. A 55 foot Fiberglass white with blue trim shrimpboat located at this Dock mentioned above.

There is now located certain property, namely,

Marijuana and documents, charts and maps related to the sale, transportation and distribution of said marijuana.

which is contraband which is in violation of the Georgia Controlled Substances Act and documents that would be evidence of the commission of the crime of possession and transportation of marijuna.

Based upon the affidavit given under oath or affirmation and all other testimony given to me under oath or affirmation I am satisfied that there is probable cause to believe that a crime is being committed or has been committed and that the property described above is presently located on the person, premises and vehicle described above. You are hereby commanded to search forthwith, and within Ten (10) days, the person, premises and vehicle described

above and to seize the property, if located, described above. A copy of this Warrant is to be left with the person searched or if no person is available, on the premises or vehicle searched, and a written return, including an inventory of any instruments, articles or things seized, shall be made before me or any Court of competent jurisdiction without unnecessary delay after the execution of this Search Warrant.

SO ORDERED this 14th day of March, 1978, at 7:50 p.m.

Jack Keel
TITLE: Ex-officio Justice of the Peace
COURT: J. P.

IT APPEARING from the aforementioned Affidavit that there are reasonable grounds to believe that the giving of verbal notice would greatly increase the officer's peril and (or) lead to the immediate destruction of the instuments, articles or things ordered to be seized, IT IS THEREFORE ORDERED that entry be made without knocking and the giving of verbal notice of the officer's authority and purpose.

SO ORDERED This____ day of___, 19__at ___.M.

_____

TITLE:_____

COURT:_____

RETURN

I received this Search Warrant and executed it on the 14th day of March 1978, and 8:00 A.M.

I searched the person, premises and vehicle described in the Warrant and left a copy of this Warrant *on Boat (Carol J)*

or since no person was available I left a copy in the following conspicuous place

On Boat (Miss Carol J)

The following is an inventory of the instruments, articles, or things seized pursuant to this Search Warrant:

See attached inventory

This inventory was made in the presence of *S-A Ralph Stone GBI* and I swear (affirm) that this inventory is a true and detailed account of all instruments, articles or things seized pursuant to this Search Warrant.

John Dasher
TITLE: Deputy Sheriff

Subscribed and sworn to and returned before me this 27th day of March, 1978, at 11:15 A.M.

John R. Harvey
TITLE: Judge
COURT: Superior Court

ITEMS SEIZED DURING SEARCH AT J. W. MORGAN'S DOCK ON MARCH 14, 1978

1. One 65 foot shrimp boat, bearing named "Miss Carol J", Official Number 555920

2. 162 bales wrapped in burlap of green leafy material

3. Latent finger prints lifted from the wheel house.

4. One Appolo Mark II alarm clock.

5. One open carton Winston Cigarettes containg 7 packs of Winstons.

6. One legal size pad.

7. One white paper towel.

8. One empty Winston cigarette pack.

9. One piece of styrofoam.

10. One green wooden pencil.

11. One package of (pill) tablets.

12. One piece of Winston Cigarette Carton bearing numbers.

13. One Holiday Inn empty match book cover.

14. Two star shaped glass ash trays.

15. One seven ounce can furniture polish.

16. One back scratcher.

17. Two packs of "Red Man" chewing tobacco.

18. One roll white toilet tissue.

19. One Green plastic tool.

20. One blue hair brush.

21. One black plastic comb.

22. One white coffee cup.

23. One volt meter.

24. One pack "3 torches" matches.

25. One operators manuel for Simrad Sounder.

26. Two charts inter-coastal waterway for St. Simons Sound.

27. One chart inter-coastal waterway to Palm Shores, Florida.

28. One specification manuel for Motorala Base Station Antenna.

29. One coverless Pent House Magazine.

30. One blue plastic drinking glass.

31. One black plastic instrument cover.

32. One white coffee cup.

33. One Craftsman screw driver.

34. One roll black electrical tape.

35. One Browning single blade pocket knife.

36. Cigarette butts from Wheel House ash tray.

37. Operating and Instruction Manuel for Nelco Auto Fix 500.

38. One Daily Log Chart.

39. One pack Red Man chewing tobacco.

40. One Notical Chart of Charleston Light to Cape Canaveral.

41. One 1977 Calander.

42. One pair pliers.

43. One 12" adjustable wrench.

44. One package Tetley Tea Bags.

45. One Box Sunshine Vanilla Waffers.

46. One Reynolds Browning Bag Box.

47. Three Brown paper bags.

48. One empty Bayer Aspirin bottle.

49. One open package of "Handy Wipes".

50. Eight boxes "3 torches" safety matches.

51. One empty egg carton.

52. Two plastic wrappers of "Dinner Plates".

53. One open package of "Dinner Platters".

54. One unopen package of "Dinner Platters".

56. One Noutical Chart for Florida Keys to Sombraro Key.

55. One Noutical Chart for Cape Kennedy to Key West.

57. One Noutical Chart for Key West Harbor and approches.

58. One plug thick cut apple brand chewing tobacco.

59. Two plastic plates.

60. One metal pot lid.

61. One Brown leather and denium cloth wallet belonging to Alan Neal Arnsdorff.

62. One black leather wallet belonging to Daniel Phillip Smith.

63. One empty Winston Carton.

64. One open Kool King carton with 8 packs.

65. Three unopen packs of Winston Cigarettes.

66. Five (5) ounce can of Libby Vienna Sausage.

67. One roll yellow plastic tape.

68. Two cans Beach Cliff Fish Steaks.

69. Three boxes "3 Torch Matches".

70. One pack "D" Cell containing 2 flash light batteries.

71. One package nylon bands.

72. One mirrow.

73. Miscellaneous personal papers, instructional charts and operating manuels.

74. One roll blue toilet tissue.

75. One set measuring spoons.

76. Two empty Winston Cigarette packs.

77. One (full) Winston Cigarette pack.

78. One pack Bysicle playing cards.

79. One Manuel for "Decca Super 101".

80. One piece of paper.

81. One paper towel tube.

82. One piece of paper towel.

83. One green plastic tackle box.

84. Two empty twelve (12) ounce coke cans.

AFFIDAVIT FOR SEARCH WARRANT

Sheriff's DEPARTMENT

GEORGIA, Liberty COUNTY Justice of Peace COURT

The undersigned, *JOHN DASHER*, being duly sworn deposes and says:

That I am an Officer of the State of Georgia or its political subdivisions charged with the duty of enforcing the Criminal Laws and that I have reason to believe that in *Liberty County, Georgia*

on the person of:

At the following described premises: Morgan's Dock Sunbury Liberty County, Georgia

And in the following described Boat: (J. K.) "Miss Carol J." a 55 foot Fiberglass white with blue trim (shrimpboat) located at this dock mentioned above.

There is now located certain property, namely

Marijuana and documents, charts and maps related to the sale, transportation and distribution of said marijuana.

Which is

contraband which is in violation of the Georgia Controlled Substances Act and documents that would be evidence of the commission of the crime of possession and transportation of marijuana.

And the facts tending to established probable cause that a crime has been committed or is being committed and that the instruments, articles or things described above are presently located as described above are as follows:

On March 13, (J. K.) 1978 at approximately 7:30 p.m. (J. K.) the above described shrimpboat "Miss Carol J" was seen docked at the Morgan's Dock Sunbury Liberty County and a substance was being unloaded on to a white Ford truck tag number PG7007 GA. The substance being unloaded appeared to be bales of marijuana. This act was witnessed by a Don Michael Drake B/M. See attached statement that is made a part of this affidavit.

At 1:05 A.M., March 14, 1978, Deputy Sheriff Groover stopped the above mentioned white Ford Truck on Ga Hwy 38. The Driver of this vehicle consented to a search of the vehicle. Three armed men were found in the rear of this vehicle. Burlap and what appeared to be marijuana seeds and residue were found in the truck.

I swear (affirm) that all information in this Affidavit and all other Testimony given by me under oath is true to the best of my knowledge and belief.

John Dasher
TITLE: Deputy Sheriff

Subscribed and sworn to before me this 14th day of March 1978 at 07:15 A.M.

Jack Keel
TITLE: Ex-officio Justice of the Peace
COURT: J. P.

IN THE SUPERIOR COURT FOR
THE COUNTY OF LIBERTY
STATE OF GEORGIA

STATE OF GEORGIA,
Plaintiff,
—vs—
DANNY SMITH,
Defendant.

INDICTMENT NO.: 2801

MOTION TO SUPPRESS EVIDENCE
ILLEGALLY SEIZED

COMES NOW DANNY SMITH, defendant named above, and respectfully moves this Court to suppress as evidence items seized on March 14, 1978, pursuant to two (2) search warrants issued by the Honorable Jack Keel on said date, and as grounds for said Motion, shows the Court as follows:

1.

That on the 16th day of March, 1978 this defendant was indicted on a special presentment in the above case, and charged with possessing marijuana with intent to distribute the same in violation of the Georgia Control Substances Act.

2.

That said indictment was based on items seized as a result of execution of two (2) search warrants issued by the Honorable Jack Keel, Ex-Officio Justice of the Peace, one (1) at 7:50 a.m. on March 14, 1978 to search Morgans Dock, Sunbury, Liberty County, Georgia, and a shrimpboat known as the "Miss Carol J" located at said dock, and the second (2nd) issued at 9:15 a.m. on March 14, 1978 to search a concrete block warehouse located on Georgia Highway 38 approximately .3 of a mile east of the SCL tracks and bearing a sign "Coastal Sign Co." and a metal building with an overhead door located next to the warehouse and the curtilage of these buildings and an enclosed truck, red cab, white body, International Harvester make, bearing GB-3761, Mississippi plates parked next to the above warehouse and a two-door Thunderbird, Maroon over Grey color, Georgia tag WCH-683.

3.

The search and seizure with warrants was illegal because:

A. – THE WAREHOUSE SEARCH WARRANT

1. This search warrant did not contain a description sufficient to enable the officer who served and executed said warrant to ascertain with reasonable certainty the place intended to be searched, nor could said officer(s) ascertain with reasonable certainty the identity of the place intended. Specifically, the warrant does not describe the county in which it is to be served and executed. See, *Vaughn v. The State*, 141 Ga. App. 453. Consequently the search and seizure was illegal because the warrant is insufficient on its face.

B. – THE BOAT SEARCH WARRANT

1. This warrant and the subsequent search and seizure was illegal because there was no probable cause for the issuance of the warrant. Specifically, the Affiant on whose Affidavit it issued had no personal knowledge of the details of any criminal information; that the facts upon which said warrant issued were not supplied by oath or affirmation; that the stopping of the truck described in the Affidavit of JOHN DASHER upon which the warrant issued was without specific and articulable facts, and constituted an illegal arrest, and the subsequent search with or without consent was illegal and consqquently not be considered as probable cause; and that the information contained in the Affidavit respecting the witness DON MICHAEL DRAKE was absent good cause for crediting the heresay; and that there was no judicial discretion exercised and determination made in issuing said search warrant.

4.

This Motion has been made to the maximum degree of specificity possible with the present state of knowledge and defendant will amend his Motion as required by Court at any time more specific evidence becomes available as to the facts and circumstances of the seizures.

WHEREFORE, the defendant DANNY SMITH moves this Court:

(a) That the District Attorney and State show cause why the prayers of this Motion should not be granted pursuant to the law of Georgia;

(b) That a full and complete hearing be had as to all matters involved in this Motion;

(c) That this Court suppress all evidence obtained in the search and seizure by execution of the above-described search warrants in Liberty County, Georgia; and

(d) That this Court declare by order that the illegally seized items be not introduced or referred to in any manner whatsoever in any trial of this case.

PYE, GROOVER, EDENFIELD & DAILEY

BY: _____
LEWIS M. GROOVER, JR.

BY: _____
GERALD M. EDENFIELD

ATTORNEYS FOR DEFENDANT

2801 Buford Highway, N.E.
Suite 375
Atlanta, Georgia 30329
(404) 325-9411

IN THE SUPERIOR COURT OF LEBERTY COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA
VS
DANNY SMITH

INDICTMENT NO. 2801

ORDER

Defendant, Danny Smith, through his attorney, moved to suppress evidence seized pursuant to two search warrants issued by the Honorable Jack Keel, Ex-Officio Justice of the Peace of Liberty County, Georgia.

The Defendant contends that the search warrant executed for the search of the warehouse was not legally sufficient. Specifically, he contends that the warrant did not mention the county in which it was to be served, which prevented the officer from ascertaining with reasonable certainty the location and identity of the place to be searched. In support of this contention, the Defendant cites the case of *Vaughn v. State*, 141 Ga. App. 453.

This Court finds that the warrant to search the warehouse was legally sufficient enabling the officer to ascertain with reasonable certainty and identity the place intended. This Court finds that the affidavit of John Dasher which was attached to said warrant shows that the location is Liberty County and that the search warrant itself was captioned Liberty County. This case is distinguished from the *Vaughn* case, supra, since in the *Vaughn* case neither the affidavit or the warrant had any designation as to city, county, or state. This Court further finds that the warrant described the location of the warehouse with such exactitude so as to allow a prudent officer to locate the place definitely and with reasonable certainty. This Court concludes that the Motion pertaining to the search of the warehouse is without merit and is hereby denied.

Secondly, the Defendant contends that the search warrant relating to the boat and the subsequent search and seizure was illegal because there was no probable cause for the issuance of this warrant.

This Court finds that attached to the affidavit and incorporated therein is a detailed eye-witness account by Don Michael Drake which was given to GBI Agent Ralph Stone. Also, included in the affidavit was a sworn statement by investigating officer, Deputy Sheriff John Dasher, which relates his investigation and further serves to corroborate the statement of Don Michael Drake. Also, prior to issuing the warrant, the Justice of the Peace had the sworn testimony of GBI Agent Stone. This Court finds that based on the above accounts, which were presented to Justice of the Peace Keel, probable cause for the issuance of the warrant did exist. Therefore, said Motion is without merit and the same is hereby denied.

SO ORDERED, this the 31st day of August, 1978.

JOHN R. HARVEY, Judge
Liberty Superior Court
Atlantic Judicial Circuit

Relevant proceedings upon the Motion to Suppress and relevant portions of the testimony of John Dasher.

These excerpts indicated lack of probable cause for the issuance of the Warrant for the search of "Miss Carol J" and also show that the search was based upon unsworn and heresay statements of the accomplice, Don Michael Drake. The excerpts are taken from the Court Reporter's transcript entitled Motion Volumne I, pp. 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 75 2nd, 77, 75 3rd, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109 and 110.

Mr. Cheney is Honorable Dupont K. Cheney, District Attorney of the Atlantic Circuit, and Mr. Groover is Mr. Lewis M. Groover, Jr., of cousel for Danny Smith.

. . . Your Honor, I think it's a sufficient affidavit. You don't have to prove there's marijuana in the boat. You have to have . . . a prudent man has got to believe from the facts that are presented to him, or from the facts that he knows of his own knowledge, uh, reason to believe that that. . . that boat contained marijuana. And I think this is sufficient, You Honor, . . .

THE COURT: All right, sir.

MR. CHENEY: . . . for a reasonable man to believe.

THE COURT: The State would intend to rely on the statement. The affidavit is not going to introduce any testimony, is that the position?

MR. CHENEY: Uh, they are alleging that the affidavit itself is not sufficient. Based upon that allegation here. Uh, the State is not going to introduce testimony other than what's in the affidavit itself. Uh, the, uh, the State would be in a position to call, uh, GBI Agent Stone, uh, be in in a position to call Deputy Dasher if the Court desires to hear from them. But they have not, uh, as I read the objections they've made, they are alleging that the affidavit itself is. . . is not sufficient. Uh, now, the State has not, uh, going to go, uh, . . . and attempt to go

outside the affidavit to show that the J. P. was given information other than what's on the affidavit itself. Uh, because the State contends that the affidavit is sufficient to give reasonable grounds to believe there's marijuana on that shrimp boat.

THE COURT: All right, sir. Do ya'll desire to introduce any evidence?

MR. GROOVER: Yes, sir.

THE COURT: All right.

MR. GROOVER: We'd like to call Officer Dasher to the stand.

THE COURT: All right.

STENOGRAPHER'S NOTE: At this time, Mr. Groover admimisters the oath to JOHN DASHER.

THE COURT: All right. All right, you may proceed. JOHN DASHER, called as a witness by the Defense, after first having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. GROOVER

Q. What did you. . . have you stated your name, sir?

A. No, sir.

Q. Would you state your name for the record, please.

A. John Dasher.

Q. And what is your occupation?

A. Deputy Sheriff of the Liberty County Sheriff's Department.

Q. How long have your been so employed, sir?

A. Since October.

Q. Of what?

A. of '77.

Q. Okay. And what have your responsibilities been in the course of your employment with the Sheriff's Office?

A. Enforcing the law. Such, uh, I've worked the roads, I've worked detective work.

Q. Okay. Have you had any special training in any particular type of law enforecment?

A. No, sir, nothing but mandate training is all.

Q. Do you recall. . . were you so employed on the night of March the 13th, 1977?

A. Yes, sir.

Q. And what were your responsibilities that night?

A. Just routine patrol.

Q. And was anyone patrolling with you?

A. Yes, sir.

Q. Who was that?

A. George Stagmeier and Clyde Simmons.

Q. Okay. Were you in any particular numbered car, or did that car have a designation from the Sheriff's Office?

A. No, sir.

Q. Did you use any call letters when you made use of the police radio?

A. Yes, sir.

Q. What were those?

A. 7K, Kenny.

Q. 7K?

A. Right.

Q. And did you have occasion to patrol along Highway 38 that night?

A. Yes, sir.

Q. And during the course of you patrolling, were you driving or was somebody else?

A. I was driving part of it.

Q. Were you. . . would. . . would you tell me what time period you drove?

A. Yes, sir, from about the first of dark until 9:30, 10:00 o'clock. Somewhere along in there.

Q. Okay. Now, in the course of patrolling Georgia Highway 38, did anything out of the ordinary as far as you were concerned as a Police Officer, come to your attention?

A. Yes, sir.

Q. And what time was that?

A. Between 8:30 and 9:00 o'clock.

Q. And would you describe to the Court what you observed or heard about that caused you to think it was out of the ordinary?

A. We seen some movement around the Coastal Sign Company.

Q. Sir, would you describe what that is for the Court, please?

A. What, the Coastal Sign Company?

Q. Yes, sir.

A. A warehouse located down at Midway.

Q. Okay. Now, is there anything there beside that warehouse?

A. There's another warehouse there.

Q. Another warehouse.

A. Right. A trailer.

Q. And at the time you first observed it, were there any other buildings or cars or trucks or anything else around it?

A. Other buildings?

Q. Yes, sir.

A. Right.

Q. What other buildings were there?

A. Well there's other warehouses, couple of warehouses there, there's a trailer there.

Q. On. . . within the curtilage of the warehouse, is that correct?

A. Um-huh.

Q. Were there any vehicles around there?

A. They had several vehicles there, yes, sir.

Q. All right, could you tell us what they were, please?

MR. CHENEY: Your Honor, the State is going to object to any further questioning as to the warehouse, as the issue before the Court new is to determine whether they had probable cause to search the boat or not. I don't know what the relevancy is in . . .

MR. GROOVER: I don't. . .

MR. CHENEY: . . . asking this Deputy Sheriff concerning the warehouse that he saw up on Highway 38.

THE COURT: What would. . .

MR. CHENEY: Unless he could tie it in with the boat.

THE COURT: What would be the relevancy of it, Mr. . .

MR. GROOVER: Uh, as I. . .

THE COURT: . . . Groover?

MR. GROOVER: . . . understand the facts, Your Honor, they started at the warehouse and all this, uh, blossomed into them stopping the truck and going to the dock.

THE COURT: All right, I'll overrule the objection.

Q. Would you repeat the last. . . do you remember the question, sir?

A. No, sir.

MR. GROOVER: Would you repeat that please? Could you repeat my last question to me?

COURT REPORTER: Let me play it back for you.

MR. GROOVER: Okay.

THE COURT: All right. What were the other vehicles around the warehouse was the question.

Q. What were the other vehicles around the warehouse?

A. Okay, they were an old Chevrolet truck there, and alot of his pecan trucks, that's his, uh, . . . I believe it was pecan truck, I'm not really sure.

Q. You say "his", who do you mean?

A. Well, whoever owns the trucks there, I'm not really sure who owns them.

Q. Okay.

A. Had several bi. . . big trucks there.

Q. What do these big trucks look like?

A. Well one of 'em looked like a tractor and trailer, other on looked like a ten wheeler, the other one looked like a ice cream truck. Just different kinds.

Q. And were these trucks normally there as you'd seen on previous nights?

A. Right.

Q. Okay, so it was normal for trucks to be at the warehouse, is that correct?

A. Right.

Q. Now, what, uh, . . . did you observe in specifically to cause you any alarm about what you observed?

A. I seen someone walking around on the outside.

Q. Okay. Had you ever been down to that warehouse before March the 13th, that night?

A. Yes, sir.

Q. And had you ever seen anybody outside of it before?

A. No, sir, not at night.

Q. Do people live in the vincinty of the warehouse?

A. That I'm not sure of.

Q. You don't know. . .

A. As far as I knew at that time, no, sir, they was nobody living there.

Q. Did. . . was there a trailer there where somebody lived?

A. I'm not sure that they lived there or not, there was a trailer there. I've never seen one. . . anyone there.

Q. Okay, so you don't know whether it was unusual or not. . .

A. Right.

Q. . . . for people to be there since you don't know whether they live there or not, is that correct?

A. I've never seen anybody there, no, sir.

Q. But you don't know one way or the other.

MR. CHENEY: Your Honor, I think he answered the question. I'll object to him continuing to ask the witness the same question trying to get him to answer a different matter.

THE COURT: Right. I sustain the objection. It's repetitious.

Q. All right, what did you do when you saw this person walking outside the warehouse?

A. Okay, we pulled in to the warehouse.

Q. All right. Did he commit any offenses that you saw, sir?

A. No, sir.

Q. Okay. Now once you pulled in to the warehouse, would you tell me in detail what occurred?

A. We pulled up to the front of the warehouse door and Mrs. Youngblood came out and talked with us for a few minutes and we drove off.

Q. Okay. And who is Mrs. Youngblood?

A. Mrs. Su. . . Sue Yougblood.

Q. And what does she have to do with that place?

A. Well I guess it's part of her business there.

Q. Well, do you know?

A. Not for sure, no sir.

Q. All right. What conversation took place?

A. We just asked her was there any trouble and she advised no.

Q. She advised what?

A. No.

Q. All right. Were your suspicions allayed or settled at that point?

A. No, sir.

Q. Even though you'd seen no criminal activity and the owner or part owner of the place had told you nothing was wrong.

A. That's right.

Q. Okay, now what did you do. . . was that the total of the conversation that was had there at the scene?

A. Yes, sir.

Q. Okay, what did you do next?

A. We left.

Q. Where did you go?

A. We went east on 38.

Q. All right. Is that towards the coast or away from the coast?

A. That's towards the coast.

Q. All right. Specifically where did you go east on 38?

A. Down by the Isle of Wight Road. Across from it.

Q. The Isle of Wight road?

A. Right.

Q. How far from the warehouse was that?

A. Mile, half a mile.

Q. All right. What did you do when you got to the Isle of Wight house. . . or Wight Road?

A. We stopped.

Q. What did you do when you stopped?

A. We talked a few minutes.

Q. What did you talk about?

MR. CHENEY: Your Honor, I've got to object to this. Now it has nothing. . . he has not tied it in any way in to the search of the boat. He's dealing with the warehouse.

MR. GROOVER: Your Honor, is. . .

MR. CHENEY: Are we going to go from step A, when these officers started the investigation, all the way through,

fine, but that's what you're going to get from all this. And if he's entitled to all that information, fine, but it does not relate to the search of the boat.

THE COURT: What does. . .

MR. CHENEY: It relates to the search of the warehouse.

THE COURT: What is it relevant to show, Mr. Goover?

MR. GROOVER: Your Honor, they. . . we are contending that there's no probable cause attached to the issuance of the search warrant. And all of this is a part in parcel of one transaction.

MR. CHENEY: There is not a word in this affidavit for search warrant dealing with that warehouse or Mrs. Youngblood's statement, or anything else.

MR. GROOVER: There he goes trying to separate everything when it's benficial to the State. He's made the statement here today that everything was one transaction. . .

THE COURT: Well, . . .

MR. GROOVER: . . . tied together.

THE COURT: . . . well, where. . . where is it referred to in the statement or in the affidavit? I mean, uh, if it's referred to in there, in either the statement or in the affidavit, uh, then, of course, it would be relevant to the issue. If it's not referred to in there then it would be irrelevant.

MR. GROOVER: Well, it's referred to in Donald Michael Drake's statement which they attach and make a part of the affidavit, Your Honor.

THE COURT: About the warehouse?

MR. GROOVER: Yes, sir. About going to the warehouse.

THE COURT: (Pause) And where is it referred to in the statement. . . let me. . .

MR. GROOVER: I think it's in the latter three pages, Your Honor.

(Pause) "When Danny got to the dock with the trucks. . ."

that's in the middle of the sentence, . . ."I heard DeWayne tell Danny that he would meet them at the warehouse. I watched as they began to unload". . .

THE COURT: (Pause) Well, is. . . is B section of your motion directed to the search of the warehouse, or to the search of the boat?

MR. GROOVER: It's directed to the issuance of the warrant with no probable cause for the search of the boat, Your Honor. But, all of this investigation, uh, supposedly in the affidavit aroused the officers to the point that they felt they had probable cause and to go to Judge Keel with it.

MR. CHENEY: Right, Your Honor, and the statement by Don Michael Drake is . . .is nowhere in that statement, that would indicate that he observed anything that took place at the warehouse.

MR. GROOVER: I also. . .

MR. CHENEY: Or anywhere warehouse.

Secondly, uh, the, uh, the affidavit itself is silent as to showing the probable. . . probable cause, uh, to show anything that supposedly occurred at the warehouse as a basis for the issuance of the search warrant, uh, for the boat.

THE COURT: Now that's what I want to find. If you'll just give me a minute here, there is so many of these papers. Let. . .let me look at it. (Pause). . . (Court examines same)

Now was the statement of Don Drake made a part of the affidavit?

MR. GROOVER: Yes, sir, it was.

THE COURT: Okay.

MR. CHENEY: For the boat, yes, sir.

THE COURT: For the boat is was?

MR. CHENEY: Yes, sir.

MR. GROOVER: It says,. . . it says, "I also recall over-

hearing Danny ask David's brother if he knew the password to the warehouse because they were heavily armed and somebody would be inside."

THE COURT: All right, the Courts going. . .

MR. CHENEY: It doesn't specify which warehouse in that statement, Your Honor.

THE COURT: All right.

MR. CHENEY: To be connected to the. . .

MR. GROOVER: Well now. . .

MR. CHENEY: . . . Coastal Sign Company.

THE COURT: . . . well the Courts going to overrule the objection.

THE COURT: All right, sir, you may proceed.

Q. All right. Once you got to this road that you discribed for the Court and stopped, what did you discuss?

A. How unusual it was for a woman to be out that time at night by herself at the warehouse.

Q. And this was at 8:30 or 9:00 o'clock?

A. That's right.

Q. Did she tell you what she was doing at the warehouse?

A. No, sir.

Q. She didn't say, "I'm working late here tonight"?

A. No, sir.

Q. Did she work at the warehouse or did you know whether she did?

A. I don't know whether she did or not.

Q. And was that the gist of your conversation?

A. Right.

Q. And after that few words was passed, what if anything did you do, sir?

A. We decided we'd watch her for a little bit and make sure she'd be all right. See what was going on.

Q. All right. And did you leave the road a mile away from the warehouse to watch the warehouse?

A. No, sir. We walked back up the edge of the road and across from the warehouse.

Q. Across from the warehouse?

A. Right.

Q. And did you set up surveillance then?

A. Yes, sir.

Q. Where was that surveillance set up?

A. Right across the road from the warehouse.

Q. In the bushes?

A. Right there across the road.

Q. Was it in the bushes?

A. No, sir, wasn't any bushes there to amount to anything. It was cleared up and there was a telephone pole and a few bushes around there.

Q. Were you standing out in the open or were you hidden from view?

A. Sitting right on the side of the ditch.

Q. In plain view.

A. Plain view.

Q. Okay.

A. Most of the time?

Q. All right. Was there a time when you weren't in plain view?

A. Yes, sir.

Q. When was that?

A. When we left.

Q. And that's, uh, from continuously from the time you got here until you left, you were in plain view.

A. Right.

Q. Okay. Did. . . would you tell the Court how far away you were from the warehouse? In terms of yards.

A. Probably 50 yards, maybe 60. I'm not really sure.

Q. And was it dark

A. Yes, sir.

Q. And was it foggy that night?

A. Not that I recall.

Q. Wasn't any fog at all the night?

A. There probably was, sure.

Q. Okay. Now, how long did you watch the warehouse?

A. At what point?

Q. At that point.

A. If that's the one, we stayed there approximately 30 minutes to a hour.

Q. Okay, and what did you see in the course of that 30 minutes to an hour?

A. Seen a Thunderbird pull in.

Q. Is that all?

A. At that point, yes, sir.

Q. Okay. All you saw was a Thunderbird ride in and, uh, the rest of the time you saw nothing and then left.

A. No, sir.

Q. That's incorrect?

A. That's right.

Q. Tell me where that's incorrect, please.

A. When it left. . . it did't leave. . . we seen more before it left.

Q. You seen more of what?

A. Well he pulled up there and stopped, the subject got out of it.

Q. Did you recognize the subject?

A. No, sir.

Q. Because you didn't know him or because you were too far away to tell who it was?

A. Because I didn't know him.

Q. Okay. Do you know what he looked like?

A. He was a white male.

Q. Any other description of him?

A. Kind of long hair.

Q. How much. . . was he fat, slim?

A. He wasn't fat, kind of medium built.

Q. Okay. How old did he appear to be?

A. I really didn't pay any attention.

Q. Any other characteristics about him that would be identifiable?

A. No, sir.

Q. Okay. Now after he got out of the car, what if anything did you see?

A. Seen the car turn around and head back out towards the highway and stop again.

Q. While the car was there, did you see him, uh, after he got out of the car, go into the warehouse?

A. He went towards the trailer, I'm not sure of where he went at that point.

Q. You lost sight of him.

A. Right.

Q. Did he come back to the car that you saw?

A. I'm not sure if it's the same one or not. Somone came back to the car I guess.

Q. And got in the car and the car left.

THE COURT: Well, why are we getting away from the issue involved. . .

MR. GROOVER: Well, . . .

THE COURT: . . . If . . . if it's not referred to in the affidavit? The only issue for the Court to determine in this, if I understand correctly, is whether or not there was sufficient evidence for the Justice of the Peace to establish probable cause to issue the search warrant. And if it's in the

affidavit,. . . the State. . . the State agreed to rely entirely upon the statement of Mr. Drake and the affidavit is sworn to by the officer. And unless those things are referred to in his affidavit or unless he can establish that additional evidence was given before the Court it looks like to me like it would be irrelevant.

MR. GROOVER: Well, Your Honor, I think all of their activities that night that lead them to present this matter to Judge Keel for the issuance of the search warrant, . . .

THE COURT: Why would that be relevant? It's up to Judge Keel to establish probable cause. It's what evidence that was presented to Judge Keel for him to make that determination. It wasn't what this officer did. He could have done. . . he could have been an eye witness, but if he didn't present that to Judge Keel, for him to make the legal judicial determination there was probable cause then it's irrelevant to the issue. Now, I overruled the motion awhile ago but I wanted it limited to such things that's either referred to in his statement or to, uh, uh, the statement of Mr. Drake or to. . . or upon evidence being shown that that was, uh, evidence that was presented to Judge Keel for him in making that determination.

MR. GROOVER: All right, sir.

THE COURT: So, if I understand this proceeding this is just a . . . a primary review of this Court of his judicial proceedings to determine whether or not he, in fact, had sufficient evidence to establish probable cause to issue the warrant.

MR. GROOVER: Yes, sir.

THE COURT: All right, sir.

Q. After you left the warehouse, where did you go then?

A. Went west on 38 toward Midway.

Q. All right. And how far. . . to what point did you go on 38?

A. KOG Road.

Q. To what, sir?

A. To the KOG Road.

Q. How far is that from the warehouse?

A. Approximately a mile.

Q. Is that towards the Coast or away from it?

A. Towards Midway.

Q. Well is Midway towards the Coast from the warehouse?

A. No, sir.

Q. So it's away from it.

A. Right.

Q. Now when you got to that road, what, if anything, occurred?

A. Turned around.

Q. All right, once you got turned around, what did you do, sir?

MR. CHENEY: Your Honor, are we going to continue with this? I. . . I. . .

THE COURT: Uh, right, unless he can establish. . . did you tell Judge Keel all that that night and things for him to make up. . . make his Judicial determination?

A. No, sir.

THE COURT: With that I'll sustain the objection.

Q. Did you have any contact with GBI Agent Ralph Stone that night?

A. Early in the morning we did, yes, sir.

Q. All right. Would you tell me when you first had any contact with him at all?

A. First contact I had with him was at Morgan's Shrimp Dock.

Q. At what time?

A. About daylight.

Q. Well, can you estimate the time for me, please?

A. No, sir, I sure can't.

Q. Would it have been closer to 5:30 or 7:30?

MR. CHENEY: Your Honor, I think he's answered the question, that he cannot estimate the time he stated. . .

THE COURT: If he doesn't know, he doesn't know. I sustain the objection.

Q. Daylight on the 14th of March, is that correct, sir?

A. At about daylight, yes, sir.

Q. Well, does that mean that daylight ensued shortly after you had contact with him, or shortly before it, sir?

A. Shortly after it.

Q. And what was the reason for you having any contact with GBI Agent Stone?

A. To give him what information we had and. . . that I had.

Q. What information did you give him?

A. Told him partly about what we had seen.

Q. Uh, would you tell me in detail what information you gave GBI Agent Stone?

A. At this time I don't really remember exactly what all I did tell him, at that point.

Q. So you're unable to say anything about what you. . .you gave to GBI Agent Ralph Stone.

A. Right.

Q. At Morgan's Dock.

A. Right.

Q. Okay. Do you remember how long any conversation you had with him lasted?

A. No, sir, I don't.

Q. All right. After you had talked with him, and given him what you had, did he give you any information?

A. Yes, sir.

Q. What did he tell you?

A. He give me the affidavit, the statement from Don Drake

that you see on the search warrant.

Q. He gave you what, sir?

A. The statement you see on the search warrant from Don Drake.

Q. All right. Did he just hand it to you?

A. No, sir, we read over it.

Q. Who read it over?

A. Mr. Cheney.

Q. Mr. Cheney was there also?

A. Myself. Yeah.

Q. Was there anybody else there?

A. There was several people but I think we was the only ones that was reading it together then.

Q. Now, you and Mr. Cheney and GBI Agent Stone met there and you gave GBI Agent Stone what you had and he gave you a. . .a statement of what purported to be from Don Michael Drake and you read it over, is that correct?

A. That's correct.

Q. Did anything else transpire in that meeting?

A. No, sir.

Q. Had anything been searched at that time?

A. No, sir.

Q. And do you know of your knowledge or from hearsay even, how they came to get a statement from Donald Michael Drake?

A. No, sir. When I got there he had the statement.

Q. Okay. Did you see Donald Michael Drake there?

A. Yes, sir.

Q. Where was he?

A. He was in the car with Ralph Stone.

Q. In the car with what?

A. Ralph Stone.

Q. Ralph Stone?

A. Yes, sir.

Q. What does that mean?

A. That's GBI Agent Stone.

Q. Oh. Okay. When you had concluded reading a statement over, what, if anything, did you do?

A. Myself and Mr. Cheney and his assistant drew up a search warrant for the Carol J.

Q. Okay. Now let's go back just a moment to earlier in the morning, had you had any contact with Deputy Sheriff Miles Groover?

A. Yes, sir.

Q. And would you tell us when that occurred?

A. Probably about 11:00 o'clock, a little after.

Q. 11:00 p.m.?

A. Yes, sir.

Q. And what was your occasion for being in contact with him?

A. Had radio contact with him.

Q. What was the substance of that radio contact?

A. To ask him would he come down to Midway.

Q. Okay. Did he come?

A. Yeah.

Q. After your call? And did he. . .you. . .he got there about 11:00 o'clock, is that correct?

A. Between 11:00 and 11:30.

Q. And was anyone with him?

A. Not to my knowledge, no, sir.

Q. Okay. Now, when he arrived, what transpired?

A. He met with another Deputy Sheriff. Stagmeier.

Q. Did he meet with you?

A. No, sir.

Q. Okay. But you saw him there, is that correct?

A. No, I had radio contact with him is all I had at that time.

Q. Okay. And where did he meet with Deputy Sheriff Stagmeier?

A. That I'm not really sure. I think maybe down at the Amoco Station.

Q. And do you know what his purpose for coming to meet you was?

A. Yes, sir, in case we needed any help.

Q. And did you give him any instructions or did the two of you agree upon any course of action that Deputy Sheriff Groover would take once he got down there?

A. No, sir, not once he got down there.

Q. Had you agreed previously to what he would do?

A. Yes, sir.

Q. What was your agreement about then?

A. If we needed any vehicles checked he would check 'em for us.

Q. You were planning on checking on some vehicles when you called him, is that correct?

A. Yes, sir.

Q. Based upon the fact that there was a woman at the warehouse at 9:00 o'clock at night.

A. No, sir, not then.

Q. What was it based upon?

MR. CHENEY: Your Honor, objection again. Now he's gotten away again from anything that might be in the affidavit.

THE COURT: I sustain the objection unless he's referring to. . .

MR. GROOVER: Your Honor, this is directly connected with the affidavit that goes to the stopping of what they used to try and prop up the statement of Don Michael Drake. The stopping of the vehicle.

MR. CHENEY: Well if he's going to ask questions about

the stopping of the truck, fine, but not about any vehicle that was stopped or any vehicle that was checked.

THE COURT: Only those that are referred to in either the statement or the affidavit would be relevant. Now that's the ruling of the Court.

Q. All right, once you got Deputy Sheriff Miles Groover to the scene, he and of. . . Office Stagmeier had met, what to your knowledge did they do?

A. When they met I dont't know what they done.

Q. Well, from that point on, do you know of any course of action that Deputy Sheriff Miles Groover took?

A. Yes, sir, he stopped the truck. Couple of'em.

Q. Stopped what truck?

A. He stopped the Ford truck and then he stopped the Ford van truck.

Q. What kind of Ford truck was it that he stopped?

MR. CHENEY: Objection, Your Honor, that's not referred to in the affidavit, it has nothing to do. . .

THE COURT: It's not in it, I sustain the objection.

MR. GROOVER: (Pause) There is a Ford truck referred to in the affidavit, Your Honor.

MR. CHENEY: It's a Ford van truck, Your Honor.

MR. GROOVER: No, it's a white Ford truck.

THE COURT: All right, as to that one you can testify about it.

MR. CHENEY: Okay.

A. He stopped a white Ford van truck.

Q. Did you witness this?

A. No, sir.

Q. How did you find out about it?

A. Had radio contact.

Q. With who?

A. With Miles Groover.

Q. You talked with him directly yourself?

A. Yes, sir.

Q. What, if anything, did he tell you about it?

A. He told me there was five subjects in the truck.

Q. Is that all?

A. At that point, yes, sir.

Q. All right. Did he talk with you any further about it. . .

A. Not. . .

Q. . . . that night?

A. . . .no, sir, not that night. I didn't see him anymore.

Q. So that was all you knew.

A. Right.

Q. Now, what time did you first get in touch with Judge Keel, or did you? Did Mr. Cheney do that?

A. I'm not sure if he did or not, I don't know who called the Judge.

Q. How did you come to go to Judge Keel?

A. Deputy Sheriff Smiley sent for me and I went down to the Morgan's Dock. And Judge Keel was there.

Q. Judge Keel came down to the dock.

A. Yes, sir.

Q. At Deputy Sheriff Smiley's request.

A. Right.

Q. Okay. And what transpired between you and, uh, Judge Keel once you got down there?

A. Okay, we had our search warrant drawed up, and we showed it to him, he read it and he signed it for us.

Q. Okay. Was that all that transpired?

A. Yes, sir. At that point.

MR. GROOVER: May I have just a moment, Your Honor?

THE COURT: Yes, sir.

Q. Did you fill the information on the search warrant in yourself?

A. No, sir.

Q. Who filled that in?

A. Mr. Cheney.

Q. Were you standing there when. . .when Judge Keel was reviewing these papers?

A. Yes, sir.

Q. Were you ever placed under oath?

A. Yes, sir.

Q. When was that? After he'd read the statement?

A. Before.

Q. And was Judge Keel paid anything to your knowledge for the issuance of the search warrant?

A. To my knowledge, no, sir.

Q. He. . .he simply, uh, swore you in, as you previously stated, and did any. . .any conversation pass?

A. Yes, sir, we reveiwed it, went over the search warrant together, both of us.

Q. All right. And you told him that what was in the affidavit was true to your knowledge.

A. Right.

Q. And that was all that took place before he signed it.

A. Yes, sir.

Q. Did GBI Agent Ralph Stone say anything to you when he gave you the statement, Officer Dasher?

A. Yes, sir.

Q. What?

A. He told me that he had a witness and give him him a volunteer statement.

Q. Is that all?

A. To the best of my knowledge, yes, sir.

Q. Now, did you at ever. . . at. . .at any time see anything in the course of the night other than bales wrapped up in 'krocker' sacks?

A. Well, I. . .

MR. CHENEY: Wait a minute, Your Honor, that does not relate to the boat itself. New that relates to what he saw on the boat, fine. . .

THE COURT: Right.

MR. CHENEY: . . . it's relating to something else. . .

THE COURT: If. . .if it's directed to. . .to that then I'll overrule it. If it's linked to what's on the boat I overrule the objetion.

Q. Other than what is in your affi. . .affidavit for this search warrant, Office Dasher, did you see any other. . . other, uh, activities or observe anything to lead you to believe to the truth of it? Of the affidavit.

A. Would you repeat that, please?

Q. Yes, sir. Other than what you have described in this affidavit, did you see anything that would lead you to believe that it was true and correct?

A. Did I see?

Q. Yes.

A. No, sir, not personally.

Q. Did Deputy Sheriff Groover describe his stopping of this truck to you?

A. Yes, sir, later on.

Q. After the search warrants were issued?

A. I'm not sure whether it was before or after.

Q. Would you. . .would you tell me what he described to you, please?

A. He described there was two people in the truck. In the front of the truck. Then he went to the back of the truck and the man voluntarily opened the back door of the truck and he said there was several other people in there.

Q. Okay. Was there anything else that he described to you?

A. Except that he got three guns out of the back of the truck. Hand guns.

Q. Is that all?

A. Yes, sir. No, sir, I take it back. They got some marijuana seeds and some burlap scraps I think.

Q. Okay. Do you know what those seeds totaled in weight or. . .

A. No, sir, I don't.

Q. That wasn't measured, to your knowledge?

A. It was sent to the Crime Lab, yes, sir.

MR. GROOVER: That's all we have of this witness.

THE COURT: All right, you may cross examine if you have any questions.

CROSS EXAMINATION BY MR. CHENEY

Q. John, prior to the time that, uh, you signed the affidavit for this search warrant, had you been aware. . .made aware that, uh, the truck had been stopped? The big van, the white van.

A. Yes, sir.

Q. Aware of how many people were in the truck?

A. Yes, sir.

Q. And that some weapons were found in the back.

A. Yes, sir.

Q. And were made aware that there had been both burlap and marijuana scraps found in the truck that was searched?

A. Yes, sir.

Q. Okay. And that information had been given to you prior to the time that you signed the affidavit for the search warrant?

A. Yes, sir, I'm pretty sure.

Q. And. . .well now it's contained. . .did you read the affidavit to the search warrant prior to the time you signed it?

A. Yes, sir.

Q. Okay. (Pause) Is this the affidavit that you signed?

A. (Witness examines same) Yes, sir.

Q. Okay. Did you look at that af. . .now did you. . .you indicated that you did not personally write out what was on that affidavit.

A. Right.

Q. Did you. . .did someone go over it with you, and did you read that affidavit before you signed it?

A. Yes, sir.

Q. And were you at that time sure that what was on there was correct?

A. Yes, sir.

Q. And does that affidavit contain the information about the marijuana seeds, or marijuana scraps and burlap being found in the truck?

A. Yes, sir.

Q. All right. Therefore you were informed of that fact prior to the time.

A. Right.

Q. And was this by law enforcement officers that informed you of that?

A. Yes, sir.

Q. Who was it?

A. Miles Groover.

Q. Okay.

A. And Deputy Sheriff Stagmeier.

Q. Thank you, sir. Did you go over in detail the statement that had been given by Don Michael Drake?

A. Yes, sir.

Q. Ralph Stone do that with you?

A. Yes, sir.

Q. And did you read it thoroughly?

A. Yes, sir.

Q. Were you aware of what it said in there?

A. Right.

Q. And after you had read that statement, uh, were you of the opinion that they had off-loaded marijuana off the boat?

A. Yes, sir.

Q. Okay.

MR. CHENEY: No more questions of this witness.

THE COURT: All right. Anything further on re-direct?

MR. GROOVER: Yes, Your Honor.

RE-DIRECT EXAMINATION BY MR. GROOVER

Q. Did. . .to your knowledge, Deputy Sheriff Groover have any particular reason for stopping that truck?

A. Yes, sir.

Q. What was that?

A. I asked him to check it.

Q. You ask him to check every truck that came up and down the road?

A. No, sir.

Q. Why did you ask him to check that truck?

A. We had reason to believe that it had been hauling marijuana that night.

Q. Where did your reason come from?

MR. CHENEY: Objection, Your Honor, that goes again

now to the search of the truck and not what was found in it.

MR. GROOVER: Your Honor, the search of the truck is a viable part of the affidavit.

MR. CHENEY: What was found in the truck, Your Honor.

MR. GROOVER: It was used to prop. . .

MR. CHENEY: Not the search. . .

MR. GROOVER: Used. . .

MR. CHENEY: . . .but what was found in it.

MR. GROOVER: . . . it was discussed thoroughly and used to prop up the statement of Donald Michael Drake.

THE COURT: All right. The Court is going to overrule the objection.

All right, sir. Re-state your question to him.

MR. GROOVER: Would you read it back to him, please?

COURT REPORTER: I'll play it back for you.

Q. I think it was why you had reason to stop that particular truck. Where did the reasons. . .

A. No, that. . .

THE COURT: Yeah, he. . . I believe that was his testimony, he had reason to believe that it had been hauling marijuana.

Q. Where did the. . .

THE COURT: Reason come from. . .

Q. . . .reason come from?

THE COURT:. . .that was your question.

A. We seen it. . . what appeared to be marijuana being offloaded of the truck.

Q. All right. And where was that, sir?

A. At the warehouse, Coastal Sign Company.

Q. All right, sir, and was that from 60 yards across the street at night?

A. Yes, sir.

Q. And were all the bales that you saw wrapped up?

A. Yes, sir.

Q. And to your knowledge is there anything else in the County that's baled up, loaded and unleaded on conveyances in warehouses?

A. Not at 1:00 o'clock at night.

Q. Well you said this was at 8:30 or 9:00, didn't you?

A. No, sir, I never did say.

Q. Well, why don't you say now.

A. It was approximately about 1:00 o'clock.

Q. And would you tell me what your observations were about that? What did you see in the way of off-loading bales specifically?

A. Seen what appeared to be bales of marijuana being off-loaded from the truck into the warehouse.

Q. But you didn't know they were bales of marijuana, did you?

A. No, sir.

Q. All you saw were bales being unloaded.

A. What appeared to be bales, right.

Q. And that's why. . .that's why Deputy Sheriff Groover Stopped that truck.

A. Yes, sir.

Q. To your knowledge. (Pause) Was there anything between where you were sitting on the bank of the ditch and where the truck was that you saw these bales you say being off-loaded?

A. Yes, sir.

Q. What was that?

A. There was a little building there. Also a truck.

Q. There was a little building and what?

A. A truck.

Q. What kind of truck?

A. Tractor trailer truck.

Q. And it. . .this building and this truck. . .tractor trailer were between you and where the truck was being unloaded that you say you saw?

A. Time to time, yes, sir.

Q. Did you move around to any other spots?

A. Yes, sir.

Q. Where was that?

A. Same side of the road, just fluctuating from one end to the other.

Q. Okay. And you were never any closer than 60 yards away, is that correct, sir?

A. At that time, no, sir.

Q. Were you closer than that at any other time?

A. Yes, sir.

Q. When was that?

A. Earlier and later.

Q. All right. Will you tell me about your. . .what occurred when you got closer earlier and later than that?

MR. CHENEY: Your Honor, if it does not relate to the . .to seeing the bales of marijuana off-loaded from the truck, the State will object to it. I don't think, uh,. . .

THE COURT: Does it relate to that?

A. No, sir.

THE COURT: All right, I sustain the objection.

Q. Mr. Dasher, at the time you saw bales being unloaded from a truck to a warehouse at 1:00 o'clock in the morning, you were 60 yards away, is that correct, sir?

A. Approximately, yes, sir.

Q. And it was night.

A. Yes, sir.

Q. And it was foggy out, and the bales were wrapped, is that correct, sir?

A. Right.

MR. GROOVER: That's all I have, Your Honor.

THE COURT: All right. Any. . .anything further on re-cross?

MR. CHENEY: Yes, sir.

RE-CROSS EXAMINATION BY MR. CHENEY

Q. From where in view of your position across the road, did you have a clear view of the back of the truck, what was being taken off the truck into the warehouse?

A. Yes, Sir.

Q. Were the lights on at the metal warehouse at this time?

A. Yes, sir.

Q. There were some lights on out in that area that you could see by?

A. Right.

Q. Were you hampered by any type of dense fog where you couldn't see across the road?

A. No, sir.

Q. Could you see clearly across the road?

A. Yes. sir.

Q. Had you had any experience before with. . .with large quantities of marijuana that had been brought in or found in this County?

A. Yes, sir.

Q. Do you know what a bale of marijuana generally looks like?

A. Yes, sir.

Q. All the marijuana that you have seen in the past has been found out on the Coast and. . .and in different areas, had it all been, uh,. . .appear to be the same as far as the manner in which it's baled?

A. Yes, sir.

Q. Using burlap.

A. Right.

Q. All right, did you observe the bales that were being taken off that truck?

A. Yes, sir.

Q. And were those bale. . .those bales identical to the bales of marijuana that you had seen before in various operations before?

A. Yes, sir.

Q. Did you believe at that time that is was marijuana, or pecans that were being off-loaded?

A. Marijuana.

Q. Okay. And this was based on you experience in what you had seen in the past.

A. Yes, sir.

Q. And what you saw that night.

A. Right.

Q. And the type of operation that was going on, and the, uh, . . .the, uh, time of night it was, and in the manner in which it was being conducted, all of that went together to make you believe that you knew. . .

RE-RE-DIRECT EXAMINATION BY MR. GROOVER

Q. You stated to Mr. Cheney that you had experience with burlap bales before, have you ever seen cotton wrapped in burlap?

A. No, sir.

Q. Never had that experience.

A. No, sir.

Q. Do you know what it's wrapped in?

A. No, sir.

Q. And your observations of this off-loading were at a time when a tractor trailer truck and a small building were directly between you and where you were observing.

A. Not directly, no, sir.

Q. Well, they were at some part in the way of your line of vision, weren't they?

A. Yes, sir.

THE COURT: All right, you. . .

Q. Did you ever cross the road and get any closer than from across the road?

A. Not at that point, no, sir.

THE COURT: All right, you can step down.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-2052

DANNY SMITH,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1.

Whether the Georgia courts properly applied federal law in determining that a warrant for the search of the Shrimp Boat "Miss Carol J." was issued based on a finding of probable cause?

2.

Whether the Georgia Court of Appeals properly affirmed Petitioner's conviction based on its finding that the Petitioner's accomplice's testimony was sufficiently corroborated in accordance with Georgia law?

PART ONE

STATEMENT OF THE CASE

Petitioner, Danny Smith, was convicted in the Superior Court of Liberty County, Georgia, on one count of possession of marijuana with intent to distribute. On appeal to the Court of Appeals of Georgia, Petitioner cited as error, the denial by the trial court of his motion to suppress evidence which he claimed had been illegally seized as a result of allegedly illegal searches and seizures. Petitioner had urged in his motion to suppress heard by the trial court that the search warrant for the "Miss Carol J." was issued without probable cause, making any subsequent search and seizure illegal. However, the trial court found that probable cause for the issuance of the search warrant existed. The trial court noted that there was included in the search warrant an affidavit containing a sworn statement by investigating officer, Deputy Sheriff John Dasher; an eyewitness account by accomplice Don Michael Drake, incorporated by reference to the affidavit, and further, that prior to issuing the warrant, the justice of the peace had heard the sworn testimony of G.B.I. Agent Stone. Therefore, the trial court denied Petitioner's motion to suppress.

When the validity of the trial court's ruling was examined on appeal to the Georgia Court of Appeals, that court referred to the companion case of Cuevas v. State, 151 Ga. App. 605, 607(1) (1979) and found that the ruling in that case, in which the court reviewed a similar motion to suppress and found that it was properly denied, was also controlling in the instant case.

The Court of Appeals of Georgia cited state law, as well as federal law in determining that this contention was without merit.

A motion for rehearing filed in the Court of Appeals of Georgia was denied on March 31, 1980. The Supreme Court of Georgia denied Petitioner's application for a writ of certiorari on April 29, 1980. This petition for a writ of certiorari followed. Further facts will be developed as is necessary for a more thorough illumination of any issue raised in this petition for a writ of certiorari.[1/]

[1/] A detailed statement of the facts surrounding the search and seizure now challenged by the Petitioner is set forth in Appendix No. 4 to the Petitioner's brief, i.e., a copy of the opinion of the Court of Appeals of Georgia in Cuevas v. State, 151 Ga. App. 605 (1979).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE GEORGIA COURT OF APPEALS PROPERLY FOUND THAT THE TRIAL COURT COMMITTED NO ERROR IN DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED FROM THE "MISS CAROL J.", AS THE SEARCH WARRANT WAS PROPERLY ISSUED.

Petitioner argues that the search warrant issued for the search of the Shrimp Boat, "Miss Carol J." was without probable cause. An affidavit of John Dasher, Deputy Sheriff of Liberty County, Georgia was attached to the search warrant. Petitioner argues that this affidavit from Deputy Sheriff Dasher is not sufficient probable cause upon which to issue the search warrant. Petitioner claims that the affidavit from the Deputy Sheriff was insufficient because he had "no knowledge of the matters related," because his information was based upon the unsworn statement of accomplice Don Michael Drake, made to G.B.I. Agent Ralph Stone and Deputy Groover. Petitioner is therefore claiming that the affidavit on which the search warrant was based contained hearsay information and could not properly be used to find probable cause for the issuance of the search warrant by the justice of the peace.

In considering Petitioner's allegation, the Court of Appeals of Georgia noted that in the companion case of Cuevas v. State, 151 Ga. App. 605 (1979), the court had extensively reviewed a similar motion to suppress evidence and that this ruling was controlling in the instant case.

However, the Court of Appeals of Georgia went further and stated that:

> "Hearsay information which relates to the criminal activity in such detail as to assure the magistrate that the information provided is more than a casual rumor circulating in the underworld may also establish the needed credibility and reliability. Sams v. State, 121 Ga. App. 46, 48 (1)(172 S.E.2d 473); Smith v. State, 136 Ga. App. 17, supra. There is no merit in this complaint."

(Appendix to Petitioner's brief, p. 4).

The trial court had determined that the proper standard was met to authorize the issuance of the search warrant based on the affidavit of Deputy Sheriff Dasher, by noting that attached to the affidavit and incorporated by reference, was a detailed eyewitness account by Don Michael Drake as given to G.B.I. Agent Ralph Stone. The trial court noted that the affidavit of Deputy Sheriff Dasher related his investigation and corroborated the statement of Don Michael Drake. The trial court also noted that prior to issuing the warrant, the justice of the peace had the additional sworn testimony of G.B.I. Agent Stone. (Appendix to the Petitioner's brief, p. 35). The trial court concluded that on the basis of all of these factors, the justice of the peace properly found that probable cause existed for the issuance of the warrant. The testimony held in the hearing on the motion to suppress the evidence, apparently convinced the Court of Appeals of the reliability of the hearsay information contained in the affidavit and its attachments and it found that the information

before the magistrate was sufficient "to assure the magistrate that the information provided is more than a casual rumor circulating in the underworld."

Although the Petitioner cites Spinelli v. United States, 393 U.S. 410 (1969), in support of this allegation, the language just cited from the Court of Appeals opinion is taken directly from Spinelli v. United States, supra. Id. at 416. Therefore, the Spinelli standard for the determination of the reliability of hearsay information was actually used by the Court of Appeals of Georgia.

Further, the Georgia decision cited by the Court of Appeals of Georgia in Smith v. State, 136 Ga. App. 17 (1975), properly cites the other applicable federal standards in determining whether or not an affidavit based on hearsay is reliable. For example, the Court of Appeals of Georgia, in Smith v. State, supra, cited the decision of this Court in United States v. Ventreska, 380 U.S. 102, 108 (1965), for the proposition that:

> "Hearsay may support the issuance of a valid warrant if the magistrate is informed of some of the underlying circumstances supporting the affiant's conclusions and his belief that the informant was credible or his information reliable."

Smith v. State, supra, also cited the decision of this Court in Jones v. United States, 362 U.S. 257 (1960), for the proposition that obervations of an informant, even if they are hearsay, are sufficient to establish probable cause as long as there is a substantial basis for crediting such hearsay.

It should be noted that in many cases, such as Spinelli v. United States, 393 U.S. 410 (1969), the informant was unidentified. In the instant case, the informant was specifically identified, as was the manner in which the informant made his observations of criminal activity.

As this Court noted in United States v. Harris, 403 U.S. 517 (1971), a statement which is an admission of one's own criminality can be used in establishing credibility. This method of establishing the reliability of an informant's hearsay information was also noted by the Georgia Court of Appeals in Smith v. State, 136 Ga. App. 17, 19 (1975). The testimony of G.B.I. Agent Stone and the statement of Mr. Drake attached to the warrant was an admission of criminality under the standards of United States v. Harris, supra. The statement of Don Michael Drake shows his admission that he had been hired as a lookout and had served as a lookout for this smuggling operation. The affidavit further shows that the information which he provided was obtained by personal contact with the suspects of the illegal operation,that the information concerning the off-loading of marijuana was furnished within 24 hours of witnessing the act and this information included a detailed description of the criminal operation. As the hearsay used as the basis for the affidavit was that of a named informant, making a declaration against his penal interest, the reliability of the hearsay information was sufficiently established to authorize a finding of probable cause for the issuance of the search warrant by the magistrate, as required under federal law.

Additionally, as noted by the trial court, the statement of Don Michael Drake was not the only statement establishing the credibility and reliability

of the hearsay information in the affidavit. Deputy Dasher furnished information in this affidavit which indicated how independent investigation by the Liberty County Sheriff's Department, corroborated the statement of Mr. Drake. (Appendix to Petitioner's brief, p. 29-30). Therefore, there was further support for the reliability of the affidavit of Deputy Sheriff Dasher.

As the Court of Appeals of Georgia properly applied the federal legal standards in determining that the affidavit, containing reliable hearsay information; was sufficient to authorize a finding of probable cause to issue the search warrant on behalf of the magistrate, this issue presents nothing for review by this Court.

B. IN DETERMINING THAT THE TESTIMONY OF PETITIONER'S ACCOMPLICE WAS SUFFICIENTLY CORROBORATED, THE GEORGIA COURTS PROPERLY APPLIED GEORGIA LAW, SO AS TO PRESENT NOTHING FOR THE REVIEW OF THIS COURT.

Petitioner contends that this Court should review the question of whether or not the testimony of Petitioner's accomplice was uncorroborated so as to be violative of his rights to due process under the United States Constitution. The Court of Appeals of Georgia examined the question of whether or not the accomplice's testimony was sufficiently corroborated by facts and circumstances directly connecting the Petitioner with the crime, in accordance with principles enunciated in numerous Georgia cases. The Georgia Court of Appeals cited the decision of the Supreme Court of Georgia in Smith v. State, 238 Ga. 640, 641 (1977), as setting out the standard. The applicable portion of Smith v. State, supra, reads as follows:

> "It is the law in Georgia that the testimony of an accomplice used to convict the accused of a crime must be supported by independent corroborating evidence as to the identity and participation of the accused tending to connect him to the crime or leading to the inference that he is guilty. Code Ann. § 38-121 (5742; 1017 P.C.). See, e.g., Birt v. State, 236 Ga. 815 (225 S.E.2d 248)(1976); West v. State, 232 Ga. 861 (209 S.E.2d 195)(1974); Allen v. State, 215 Ga. 455 (11 S.E.2d 70)(1959). However, the corroborating evidence need not of itself be sufficient to warrant a conviction of the crime charged."

Smith v. State, 238 Ga. 640, 641-642 (1977).

The Georgia Supreme Court also noted in Smith v. State, supra, that whether or not there is sufficient corroboration of the testimony of an accomplice is a jury question under Georgia law and that only slight evidence of corroboration need be shown, as a matter of law. Id. at 642.

The Court of Appeals of Georgia found that the accomplice's fingerprints, found on a legal pad and coffee cup in the wheelhouse of the Shrimp Boat from which marijuana was seized, as well as his wallet and picture found on board the boat, corroborated his testimony. Additional corroboration was supplied by the accomplice's testimony that he had in fact been aboard the Shrimp Boat, the "Miss Carol J." twice and had left his billfold on the boat, although he contended that it was not on the date alleged by the state. The Court of Appeals of Georgia applied the Georgia standard for determining whether there was sufficient corroboration and found that these items supported the accomplice's testimony in such a way as to connect the Petitioner to the crime or lead to the inference that he was guilty of the crime. As the Georgia courts properly applied Georgia law, no federal question is presented for this Court's review.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's writ of certiorari as Petitioner's rights under the Fourth Amendment were not violated by the issuance of a search warrant and the admission of items seized pursuant to that warrant and as the Georgia courts properly applied Georgia law in determining that the testimony of Petitioner's accomplice was sufficiently corroborated.

Respectfully submitted,

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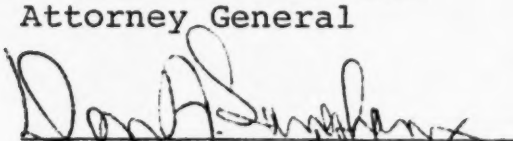

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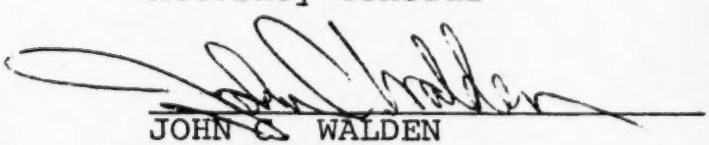

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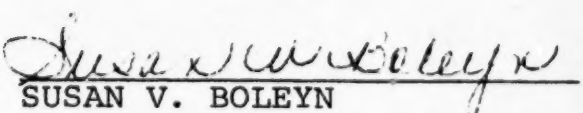

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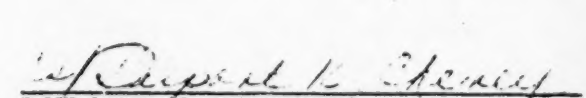

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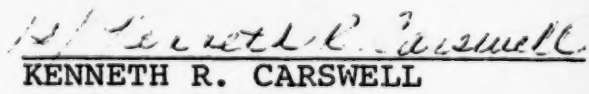

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CERTIFICATE OF SERVICE

I, Susan V. Boleyn, Attorney of record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for the Respondent in Opposition by depositing three copies of same in the United States mail, with proper address and adequate postage to:

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This 4th day of August, 1980

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